

No. 82-933

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

BROOKSIDE LIMITED PARTNERSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT (FORMERLY THE
UNITED STATES COURT OF CLAIMS)**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner contends (Pet. 14-19) that the Court of Claims erred in holding that construction inspections performed by the Department of Housing and Urban Development (HUD) on a housing project for which HUD was the mortgage insurer created no implied-in-fact contract for the benefit and protection of petitioner, the mortgagor.

1. Petitioner is the owner and developer of a housing project in Beaver Falls, Pennsylvania, known as "Brookside Apartments" (Pet. App. 24). Construction of the project was financed by the Mellon Bank, N.A., which secured its

¹Effective October 1, 1982, the Court of Claims was abolished and its appellate jurisdiction transferred to the new United States Court of Appeals for the Federal Circuit. See Federal Court Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

loan by a mortgage executed by petitioner. Pursuant to Section 221(d)(4) of the National Housing Act of 1934, 12 U.S.C. (& Supp. V) 1715(d)(4), HUD agreed on June 16, 1977, to insure the mortgage in the event petitioner defaulted (Pet. App. 24). As part of its agreement with the bank to insure the mortgage, HUD retained the right to inspect the construction project as it progressed, and to approve any payments to the contractor provided for in the construction contract between petitioner and the construction company (*id.* at 25-26). The agreement also provided that HUD would be paid a fee for making construction inspections and that the inspections performed by HUD "shall be only for the benefit and protection of the Secretary of Housing and Urban Development" (*id.* at 25).

2. Petitioner filed this action against the United States in the Court of Claims under the Tucker Act, 28 U.S.C. 1346(a)(2), seeking damages for construction defects that the government failed to discover when it inspected the project. Petitioner contended that an implied-in-fact contract existed between HUD and petitioner, which obligated HUD to inspect the project for petitioner's benefit, and that HUD breached its agreement to inspect the project properly (Pet. App. 21-22).

The Court of Claims granted the United States' motion for summary judgment (Pet. App. 24-30). First, it pointed out that none of the contract provisions relied upon by petitioner were contained in agreements between petitioner and HUD (*id.* at 31). It also found that petitioner "offered no evidence which would indicate that a 'meeting of the minds' took place between it and [HUD]" regarding whether HUD's inspections of the project were for petitioner's benefit (*id.* at 34). Accordingly, the court concluded that HUD's right to inspect the project's construction and to approve payments was intended solely to protect HUD as the mortgage insurer, which the contract with the bank

expressly stated, and that inspection fees paid by petitioner to HUD were simply a cost of obtaining mortgage insurance (*id.* at 32, 35).²

3. The decision of the Court of Claims, which involves only the factual determination that petitioner and HUD had no "meeting of the minds" with regard to the purpose of HUD's inspections, is fully supported by the record and raises no issue warranting review by this Court. As the Court of Claims correctly noted, the only document making any reference to inspections expressly described the inspections as "only for the benefit and protection of [HUD]" (Pet. App. 31).³ Since petitioner failed to present any contrary evidence that would create a dispute regarding the purpose of HUD's inspections, the Court of Claims properly granted summary judgment for the United States.⁴

²The court noted that nothing had prevented petitioner from conducting its own inspections of its project or from obtaining compensation for defective workmanship by asserting a claim against the performance bond furnished by its contractor (Pet. App. 32).

³It is true, as petitioner notes (Pet. 13), that this language is found in an agreement between HUD and Mellon, to which petitioner was not a party. But as the Court of Claims pointed out, petitioner relied on the inspection and payment-approval provisions of that same document as the basis for HUD's alleged duty to inspect for petitioner's benefit (Pet. App. 28). The court correctly reasoned that in deciding whether an implied-in-fact contract existed between petitioner and HUD, it was proper to consider the entire HUD-Mellon agreement, and not just those portions that supported petitioner (*ibid.*).

⁴The issue in this case is wholly unrelated to the issue presented in *Block v. Neal*, cert. granted, No. 81-1494 (May 24, 1982), which involves a claim that the government is liable under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for negligent inspection of a house constructed with a Farmers Home Administration loan. Both the district court and the court of appeals rejected Neal's contract claims. *Neal v. Bergland*, 646 F.2d 1178, 1181 (6th Cir. 1981), and those rulings have not been challenged in this Court.

Petitioner asserts (Pet. 16-17) that the Court of Claims' interpretation of the contract was based on deference to the contract interpretation of HUD as a regulatory agency and not on principles of contract law. This argument is totally baseless. The court found nothing in the record from which to imply any agreement between petitioner and HUD whereby HUD undertook to act for petitioner's benefit and protection (Pet. App. 34-35). Nowhere did the court suggest that HUD's interpretation of the written contract was to be accorded more deference than petitioner's because of HUD's status as an administrative agency.⁵

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

⁵Petitioner derives its novel view of the court's decision from the court's use of the term "Regulatory Agreement" to describe the contract between petitioner and HUD (Pet. App. 30). This phrase, which petitioner characterizes as a "slip" in the opinion, almost Freudian in nature" (Pet. 15), merely shows that the court referred to the contract (Pet. App. 58-86) by a shortened version of its full title, "Regulatory Agreement For Multi-Family Housing Projects," which incorporates HUD's regulations into the mortgage insurance agreement.

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F I L E D

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REPLY MEMORANDUM FOR
BROOKSIDE LIMITED PARTNERSHIP

KENNETH W. BEHREND
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(412) 391-2515

REPLY MEMORANDUM FOR
BROOKSIDE LIMITED PARTNERSHIP

The Petitioner in this case claims interpretation of a construction contract by the Lower Court was based on an erroneous deference to treat HUD as a regulatory agency for purposes of contract construction rather than upon the principles of contract law. This is a case in which HUD was erroneously treated as a regulatory agency with respect to mortgage insurance commitments it issues in federally subsidized projects.

The improper characterization of HUD as a regulatory agency, with regard to its commitments for mortgage advancement, has been made by HUD, by the Court of Claims, and now by the Solicitor General. We have reproduced, at pages 58-88 of our Petition for Writ of Certiorari, a certain HUD document which HUD has misnomered as a "regulatory agreement" although, as a practical matter, it is not a regulatory agreement as HUD is not a regulatory agency and does not have the authority that a regulatory agency has to promulgate "regulatory

agreements". The Court of Claims characterized HUD's responsibility as regulatory in nature when it said:

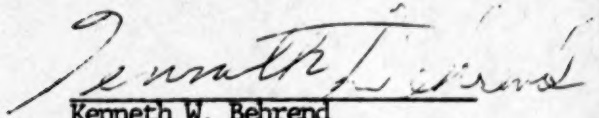
"Finally, the owner/developer of the project must enter into a "regulatory agreement" with HUD, whereby the owner/developer agrees to comply with certain HUD regulations concerning the operation of the project after it is completed" (Pet. 30).

Now, opposing counsel has adopted the same misconception of HUD's role when he states that the "regulatory agreement from all these multi-family housing projects . . . incorporates HUD's regulations into a mortgage insurance agreement". (Memorandum at Page 5).

This case should be considered by Your Honorable Court to correct a widespread belief that HUD acts as a regulatory agency, with respect to its commitments for insurance of advances in housing projects.

Respectfully submitted,

BEHREND, ARONSON & MORROW

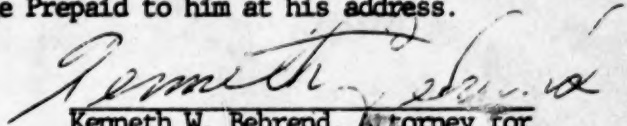
A handwritten signature in cursive script, appearing to read "Kenneth W. Behrend", written over a horizontal line.

Kenneth W. Behrend
Attorney for Petitioner
1112 Frick Building
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(412) 391-2515

February 10, 1983

CERTIFICATE OF SERVICE

I hereby certify that I have served 3 true
and correct photocopies of the foregoing document
upon Rex E. Lee by placing the same in the U.S.
Mail Postage Prepaid to him at his address.


Kenneth W. Behrend, Attorney for
Petitioner

February 10, 1983